STATE OF MICHIGAN

IN THE SUPREME COURT

(On Appeal from the Court of Appeals and Circuit Court for the County of Oakland)

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST,	SUP CT NO. 154745
Plaintiff/Appellee,	COURT OF APPEALS NO. 316418
v.	Oakland County Circuit Court No. 12-128625-CZ
CITY OF PONTIAC, MICHIGAN,	
Defendant/Appellant.	

PLAINTIFF-APPELLEE'S BRIEF IN RESPONSE TO DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL COURT OF APPEALS' OPINION ON REMAND

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COUNTERSTATEMENT OF ORDER APPEALED

This is an action for, *inter alia*, breach of a Trust Agreement due to Defendant's failure to provide a contribution for medical benefits due under collective bargaining agreements for fiscal year of 2012. Defendant asserts that the obligation was retroactively rescinded through an executive order issued by its state- appointed emergency manager. Defendant seeks leave to appeal from a written opinion of the Michigan Court of Appeals dated October 25, 2016. On remand from the Michigan Supreme Court, the written opinion of the Court of Appeals reversed a May 10, 2013 order which had granted summary disposition in favor of Defendant. The Court of Appeals held instead that Plaintiff was entitled to the grant of summary disposition in its favor due to the plain language of the executive order issued by the City of Pontiac's Emergency Manager, which did not express a clear intent to retroactively revoke the defendant's duty to pay accrued medical benefits (See: Defendant's Exhibit 4 to Supreme Court Application).

This appeal does not warrant Supreme Court relief. The Court of Appeals properly applied well settled principles that Executive Orders are to be applied and interpreted in the same manner as statutes and that, applying those principles, the Executive Order could only be applied in a prospective manner. This matter is thus one of simple interpretation and application of an executive order so as to prohibit its retroactive application when the consequence thereof would be the elimination of accrued rights unless - - at a minimum -- that directive is clearly mandated. The appeal does not present any issues significant to the jurisdiction of the state; nor does it demonstrate clear, palpable error by the Court of Appeals.

STATEMENT OF ISSUES PRESENTED

I. DOES THE RETROACTIVITY ANALYSIS STATED IN LAFONTAINE SALINE, INC v CHRYSLER GROUP, LLC, 496 MICH 26; 852 NW 2D 78 (2014) APPLY TO EXECUTIVE ORDER 225; AND, IF SO, DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE EM'S EXECUTIVE ORDER, BY ITS OWN TERMS, OPERATED PROSPECTIVELY ONLY?

Plaintiff-Appellee and the Court of Appeals say "Yes."

Defendant-Appellant says "No."

The trial court did not directly address this threshold issue.

II. WOULD RETROACTIVE APPLICATION OF EXECUTIVE ORDER 225 VIOLATE MICHIGAN'S CONSTITUTION?

Plaintiff-Appellee says "Yes."

Defendant-Appellant says "No."

The trial court and Court of Appeals said "No."

STATEMENT OF FACTS

A. Introduction.

This is an action for, inter alia, breach of a Trust Agreement due to Defendant City of Pontiac's ("Pontiac" or "Defendant") failure to provide contributions for medical benefits due thereunder for the fiscal year ending June 30, 2012. Plaintiff Police and Fire Retiree Prefunded Group Health and Insurance Trust ("PF VEBA") is the municipal fund which is entitled to the benefit contributions by Defendant. The delinquent amount is $3,473,923.28, plus applicable interest.

Defendant asserts that its obligation to pay the subject contributions to the Fund was retroactively rescinded through an executive order issued by its emergency manager appointed by the State of Michigan ("Executive Order 225"). The Executive Order, dated August 1, 2012, purported to amend the Agreement pursuant to MCL 141.1519(1)(k) of 2011 PA 4 [now repealed], to terminate the city's annual actuarially required contribution to the trust for fiscal year ending June 30, 2012. The order read in part as follows:

> "Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect."

(See: EXHIBIT 1 to Defendant's Supreme Court Application; emphasis added).

The issuance of EO 225 was preceded by the EM's letter of July 10, 2012 to State Treasurer Andrew Dillon, seeking concurrence in the EM's plan to invoke the authority of § 19(1)(k) of PA 4 to modify the trust by modifying existing CBAs to eliminate the city's obligation to contribute to the trust. The Emergency Manager stated in the letter that he

"anticipated that the City will be required by the Trustees of the VEBA to contribute $3,915,371 during the fiscal year ending June 30, 2013."

In its original written opinion, dated March 17, 2015, the Michigan Court of Appeals, the reversed a May 10, 2013 order of the trial court which had granted summary disposition in favor of Defendant. The Court of Appeals held instead that Plaintiff was entitled to the grant of summary disposition because the unambiguous language of the executive order revoked Defendant's duty to make contributions for medical benefits only prospectively.

In an Order dated May 18, 2016, the Michigan Supreme Court vacated in part the Michigan Court of Appeals' March 17, 2015 Opinion and remanded the action to the Court of Appeals for it to consider the following issues:

> (1) whether the retroactivity analysis stated in *LaFontaine [Saline, Inc v Chrysler Group, LLC, 496 Mich 26 (2014]* applies to EO 225; (2) if so, whether the extinguishment of the defendant's accrued, but unpaid, 2011-2012 fiscal year contribution by EO 225 is permissible under *LaFontaine*; and (3) if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution.

(See: Defendant's EXHIBIT 3 to Supreme Court Application)

Following supplemental briefing on remand, the Michigan Court of Appeals on remand needed to address only the first two of these issues. In an opinion dated October 25, 2016, the Court of Appeals again directed the grant of summary disposition in favor of Plaintiff. The Court of Appeals held that the retroactivity analysis in *LaFontaine* affirmatively applied to EO225 and that applying that analysis, EO 225 could not be construed as retroactively extinguishing the City's delinquent contributions (see: Defendant's Application- Exhibit 4).

B. Procedural History.

On August 8, 2012, Plaintiff filed its six-count Complaint against the City of Pontiac to compel payment of the City's annual contribution to Plaintiffs for fiscal year July 1, 2011-June 30, 2012. The claims brought by Plaintiff City of Pontiac Police and Fire Retirement System ("PFRS") were dismissed when Pontiac paid its annual, actuarially required contribution to the PFRS. Defendant filed its Answer to Complaint and Affirmative Defenses on August 15, 2012. Defendant thereafter filed a motion for summary disposition. Plaintiff responded and requested summary disposition pursuant to MCR 2.116 (I)(2). In its motion for summary disposition, Pontiac claimed it was not obligated to pay into the PF VEBA pursuant to Executive Order 225, which became effective August 1, 2012, seven (7) days before Plaintiff filed its complaint. To repeat, Executive Order 225 sought to unilaterally amend the PF VEBA Trust so that the City was no longer required "to continue" to make an annual contribution, as determined by an actuary, to the PF VEBA Trust.

A hearing on the Motion for Summary Disposition was conducted on May 1, 2013. The trial court accepted Defendant's argument that its EM properly modified the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012, by modifying the existing trust agreement and underlying collective bargaining agreement between the city and police and firefighter unions (Tr. 5-1-13, p. 32). The trial court also adopted the balance of Defendant's arguments (id).

On May 10, 2013, the trial court entered an order which granted summary disposition and dismissed Plaintiff's Complaint, with prejudice.

Plaintiff filed an appeal with the Michigan Court of Appeals.

The Court of Appeals originally reversed in its written Opinion of March 17, 2015 and held that the Executive Order, by its plain language, did not apply retroactively to eliminate the City's preexisting, past due obligations. Following the denial of Defendant's Motion for Reconsideration, Defendant filed its first Application for Leave to Appeal with the Michigan Supreme Court.

As earlier stated, the Michigan Supreme Court vacated in part the Michigan Court of Appeals' March 17, 2015 Opinion and remanded the action to the Court of Appeals for it to consider the following issues:

> (1)whether the retroactivity analysis stated in *LaFontaine [Saline, Inc v Chrysler Group, LLC, 496 Mich 26 (2014]* applies to EO 225; (2) if so, whether the extinguishment of the defendant's accrued, but unpaid, 2011-2012 fiscal year contribution by EO 225 is permissible under *LaFontaine*; and (3) if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution.

(See: Order dated May 18, 2016, Defendant's Application- Exhibit 3)

The Michigan Court of Appeals on remand needed to address only the first two of these issues. In an opinion dated October 25, 2016, the Court of Appeals again directed the grant of summary disposition in favor of Plaintiff. The Court of Appeals held that the retroactivity analysis in *LaFontaine* affirmatively applied to EO225 and that applying that analysis, EO 225 could not be construed as retroactively extinguishing the City's delinquent contributions (see: Defendant's Application - Exhibit 4).

From the October 25, 2016 Court of Appeals Opinion (on remand), Defendant filed its current Application for leave to Appeal with the Michigan Supreme Court. Plaintiff now files its response, and asks that the Supreme Court deny leave to appeal for the reasons that follow.

STANDARD OF REVIEW

As this appeal is from an order granting summary disposition, appellate review is de novo. *Spiek v Department of Transportation*, 456 Mich 331, 337 (1998).

ARGUMENT I

THE RETROACTIVITY ANALYSIS STATED IN LAFONTAINE SALINE, INC v CHRYSLER GROUP, LLC, 496 MICH 26; 852 NW 2D 78 (2014) APPLIES TO EXECUTIVE ORDER 225; THUS, THE COURT OF APPEALS CORRECTLY HELD THAT THE EM'S EXECUTIVE ORDER, BY ITS OWN TERMS, OPERATED PROSPECTIVELY ONLY

In the briefs filed with the Michigan Supreme Court relative to Defendant's first Application filed in this action, **both parties** argued that the interpretation of the State of Michigan Emergency Manager's Executive Order 225, is governed by principles of statutory interpretation because the EM's authority is derived by statute. In this regard, former MCL 141.1519 set forth the enumerated powers of an emergency manager and granted the emergency manager the ability to reject or modify a contract, including a collective bargaining agreement. MCL 141.1519(1) (j), (k). **Defendant has now completely reversed its position, out of apparent necessity.**

At issue here is the proper interpretation and application of Executive Order 225, issued on August 1, 2012, by the Defendant City of Pontiac's Emergency Manager who was appointed by the Governor. The Court of Appeals on remand adopted the Plaintiff's position that the Executive Order applies only prospectively to contributions that were not yet due on the EO's effective date. Plaintiff also asserts that the interpretation of the Executive Order is governed by the standards of statutory interpretation set forth in *LaFontaine Saline, Inc v Chrysler Group*,

LLC, 496 Mich 26; 852 NW 2d 78 (2014). Defendant asserts that the Executive Order 225 must be interpreted as retroactively terminating the city's annual actuarially required contribution to the trust for fiscal year ending June 30, 2012, notwithstanding that the contractual rights to those benefits had vested and those contributions were overdue. The Executive Order read in part as follows:

> "Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to the Trust as determined by the Trustees through actuarial evaluations. The Order shall have immediate effect."
>
> See: EXHIBIT A.

A. **Introduction to *LaFontaine***

As to whether the quoted language of EO 225 may be construed as dictating the retroactive elimination of the obligation to pay contractually overdue contributions, the Court of Appeals below properly concluded that *LaFontaine Saline, Inc v Chrysler Group, LLC*, supra, controls and requires the grant of summary disposition in favor of Plaintiff because the language of EO225 did not sufficiently express such a clear intent in specific, unambiguous terms.

In *LaFontaine*, the Michigan Supreme Court held that a 2010 amendment to the Motor Vehicle Dealer Act, which expanded from six to nine miles the area within which vehicle manufacturers must notify existing dealerships of their intent to open a competing franchise, could not be retroactively applied to a 2007 dealership agreement between Defendant Chrysler and the Plaintiff-franchisee LaFontaine Saline Inc. "Applying the amendment retroactively would alter the parties' existing contract rights," the Supreme Court stated.

The Supreme Court articulated the strict, controlling standards -- and supporting rationale-- for determining whether legislation may be applied retroactively to alter pre-existing contractual rights:

> Retroactive application of legislation "'presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions.'" We have therefore required that the Legislature make its intentions clear when it seeks to pass a law with retroactive effect. In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.
>
> 496 Mich at 38-39 [footnotes with citations omitted].

Looking first to the specific language of the Act, the Supreme Court in *LaFontaine Saline* observed that the statutory language before it made no "clear" reference of an intent to warrant application of the Act retroactively:

> Nothing in the language of MCL 445.1566(1)(a) suggests the Legislature's intent that the law apply retroactively. The Legislature "'knows how to make clear its intention that a statute apply retroactively.'" In fact, it has done so with other provisions of the MVDA, which explicitly provide that they apply to pre-existing contracts.
>
> 496 Mich at 39 [footnotes omitted].

The Supreme Court then emphasized that there would be no legislatively presumed intent to apply a statute retroactively where such would create a new obligation or take away existing contractual rights. *Id*, at 41-42. As applied to the facts before it:

> Because Chrysler explicitly reserved its right to establish such dealerships within LaFontaine's "Sales Locality" as referred to in the 2007 Dealer Agreement, Chrysler's right is contractual in nature, limited only by LaFontaine's statutory anti-encroachment rights in the MVDA's relevant market

> area provision. Accordingly, retroactive application of the 2010 Amendment would not merely "operate in furtherance of a remedy or mode of procedure," and therefore cannot be characterized as remedial or procedural. **Rather, the expansion of the relevant market area creates substantive rights for dealers that had no prior existence in law or contract, and diminishes a manufacturer's existing rights under contracts executed before the 2010 Amendment.** Application of the 2010 Amendment would give LaFontaine the substantive right to object where it previously could not—that is, the right to object to a proposed like-line dealership more **Because retroactive application of the 2010 Amendment would interfere with Chrysler's contractual right to establish dealerships outside of a six-mile radius of LaFontaine, such retroactive application is impermissible on these facts.**
>
> *Id.* [emphasis added].

Finally, in this regard, *LaFontaine* held that when the Legislature provides for an immediate or specific, future effective date and omits any reference to retroactivity, such reference supports the conclusion that the statute applies prospectively only. ["That the Legislature provided for the law to take immediate effect *upon its filing date*—August 4, 2010—only confirms its textual prospectivity"]. *Id.*, p.40.

LaFontaine is consistent with pre-existing Michigan Supreme Court standards that require that, in determining whether a statute should be applied retroactively, "the primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (citation and quotation marks omitted). The Supreme Court recently stated in this regard that the Legislature must "clearly manifest" an intent for retroactive application:

> Statutes are presumed to apply prospectively unless the Legislature **clearly manifests** the intent for retroactive application. This is especially true when giving a statute retroactive operation will . . . create a new liability in connection with a past transaction, or invalidate a defense which was good when the statute was passed. Further, [e]ven if the Legislature acts to invalidate a prior decision of this Court, the amendment is limited to prospective application if it enacts a substantive change in the law.

> *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012) (citations and quotation marks omitted; alteration in original; emphasis added).

In *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 418; NW2d (2015), the Court of Appeals recognized that concerns regarding the retroactive application of a statute stem from constitutional due-process requirements "'that prevent retrospective laws from divesting rights to property or vested rights, or the impairment of contracts.'" (Citation omitted). *Gillette* explained that a vested right is defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice (e.g. a title interest). "A vested right is a legal or equitable title to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand by another." *Id.* at 419.

Accord*: Frank W Lynch & Co v Flex Tech.*, *supra,* 463 Mich 578 at 583, *Johnson v Pastoriza*, 491 Mich 417, 429; 818 NW2d 279 (2012), *City of Detroit v Walker*, 445 Mich 682, 698: 520 NW 2d 135 (1994), *Lenawee County v Wagley*, 301 Mich App 134 ,174; 836 NW 2d 191 (2013) *Hughes v Judges' Retirement Board*, 407 Mich 75, 85-86; 282 NW 2d 160 (1979), *Campbell v Judges' Retirement Board*, 378 Mich 169, 181; 143 NW 2d 755 (1966).

B. Executive Order 225 Should Be Subject To The Same Standards Of Interpretation And Application As Legislation And Thus Should Be Subject To The Dictates Of Prospective Application Set Forth in *Lafontaine.*

Preliminarily, Defendant mischaracterizes the controlling issue as being whether EO 225 bears the characteristics of legislation such as to be subject to *LaFontaine*. Defendant in turn argues that because the executive action relates to only one contract and not to the general public, it is not a "law" and should not be subject to the dictates of *LaFontaine*. See, e. g. Application for Leave to Appeal, pp.3, 5, 10-12.

It has never been contended that EO 225 is legislation and, for that reason, is subject to *LaFontaine*. Rather, the controlling issue is whether the standards governing and severely restricting when legislation may be interpreted and applied retroactively may be extended to directives of the executive branch, such as Executive Order 225.

In this regard, it is well settled that executive orders are subject to the same standards of interpretation as are statutes because executive orders are "quasi legislative" in nature. *Soap & Detergent Ass'n v Natural Resources Comm'n,* 415 Mich. 728, 756-757 ; 330 N.W.2d 346 (1982). Accord: *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53(1999).

In *Soap & Detergent*, the Michigan Supreme Court explained:

> We understand the lack of direct authority in the briefs on construction or interpretation of executive orders, because we found little ourselves. However, two rules relating to administrative regulations, which stand in the same position as executive orders, appear in the following quotation of the United States Supreme Court in *Udall v Tallman*, 380 U.S. 1, 16-17; 85 S Ct 792; 13 L Ed 2d 616 (1964), which quoted with approval from a previous decision of that Court:
>
> "'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt * * *. [The] ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' *Bowles v Seminole Rock Co*, 325 U.S. 410, 413-414 [65 S Ct 1215; 89 L Ed 1700 (1945)]."
>
> The first rule by negative implication is that interpretation is not warranted unless "the meaning of the words used is in doubt". The second rule, of course, is that in case of doubt administrative interpretation is the "ultimate criterion"
>
> .
>
> Furthermore, in the *Udall* case, the United States Supreme Court, at least as far as administrative agency interpretation was concerned, seemed to apply the same rules of construction to *statutes* and *administrative regulations*. Specifically, the Court cited a number of statutory interpretation cases and then continued:
>
> "When the construction of an administrative regulation rather than a

> statute is in issue, deference is even more clearly in order." 380 U.S. 16.
>
> **The use of the same rules of construction for both statutes and executive orders or administrative regulations is not illogical because executive orders and administrative regulations are both quasi-legislative in nature**. See 1 Sands, Sutherland Statutory Construction, p 219; J. Asselin, *Executive Orders: Discretion vs Accountability*, 51 Conn Bar J 383 (1977).
>
> With these premises, we believe it is in order to apply the following rules to construing Executive Order No. 1976-8:
>
> 1. The executive intends the meaning that is clearly expressed; an unambiguous executive order does not need interpretation.
>
> 2. A corollary of rule 1 is that every word, sentence and section should be given effect, if possible.
>
> 3. If the meaning of an executive order is in doubt, the interpretation given by the agency administering it is persuasive as to the meaning of the order "unless it is plainly erroneous or inconsistent with the" order.
>
> 415 Mich at 756-757 [emphasis added].

It is equally as well settled that whether a statute or executive dictate is intended to be applied retroactively presents a question of "statutory construction" that is to be reviewed by the Court de novo. *LaFontaine, supra, 495 Mich at 34, Frank W Lynch*, supra, 463 Mich at 583; *In re AG For Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW 2d 594 (2007) [administrative regulations].

Applying these well settled principles, the Court of Appeals on remand below properly followed this controlling authority and correctly held that the *LaFontaine* standards for determining whether a statute is to be applied retroactively or prospectively should apply equally for resolving the same question regarding executive orders. (See: Defendant's Application- Exhibit 4, p. 5). Indeed, the retroactive application of EO 225 would trigger the same concerns as would a statute containing the same dictates and consequences: the

elimination of vested rights. **Moreover, even Defendant has recognized this controlling factor because it admitted in its prior briefings to the Michigan Supreme Court (from its first Application) that standards of statutory interpretation govern the proper interpretation of EO 225. Defendant's about face on point is shameless!**

Policy concerns also support the application of *LaFontaine* to executive orders.

Specifically, protection of vested rights of municipal funds arising from negotiated agreements is of paramount importance. When the state government argues that its directive -- whether it be by statute, administrative regulation or executive order -- must have retroactive application even though such would eliminate vested rights, the interpretation of that directive is significant and might violate constitutional rights (see: Supplemental Argument III, infra). Thus, the framework of *LaFontaine*, which serves to protect those vested interests which are potentially compromised by statute, should apply even if the directive comes from the executive branch and not the legislature. There is simply no reason for a ruling to the contrary. **This is particularly true where the directive comes from the executive branch acting with authority granted by the legislature**. Compare *Aguirre v State of Michigan*, __ Mich App __ (docket no. 327022, rel'd 6-14-16, slip op., p.5, fn 4) [executive order had the status of enacted legislation when allegedly in violation of Constitution's Contract Clause], *Health Care Ass'n Workers Comp Fund v Director of Bureau etc.*, 265 Mich App 236, 250; 694 NW 2d 761 (2005) [same].

C. The Court Of Appeals Correctly Held That The Emergency Manager's Executive Order Did Not Sufficiently And Clearly Manifest An Intent To Apply Retroactively.

Thus, to assure full protection of vested rights, a directive from either statute, administrative regulation or executive order may not be construed as retroactively eliminating

such rights unless, at a minimum, the directive contains specific language which "clearly manifests" an intent to require retroactive application to impair vested rights. Compare *Frank W. Lynch*, supra; *LaFontaine*, supra. **Here, there is no language in Executive Order 225 which clearly states or otherwise manifests an intent that the Order shall be given retroactive application to eliminate the duty to pay overdue contributions and the corresponding vested rights of the participants.** Compare, *Frank W. Lynch*, *supra*, 463 Mich at 584; *LaFontaine, supra*, 496 Mich at 42.

Rather, the Executive Order merely contains language removing the City's obligation "to continue to make contributions" to the Trust. As the Court of Appeals held on remand below, this language does not explicitly provide that it applies retroactively to eliminate vested rights by removing the City's duty to pay overdue, delinquent contributions. *Lafontaine, supra.* As the Court of Appeals also observed, the executive Order does not "acknowledge with the required clarity the existence of accrued but unpaid obligations or state directly that such obligations were being retroactively removed". (Defendant's Exhibit 4, p.7) Nor, as a matter of law, may the Court validly uphold a "presumed" intent to apply the Order retroactively because enforcement of such a presumption, would, as in *Lafontaine*, eliminate Plaintiff's existing rights under the collective bargaining agreement. 496 Mich at 41-42.

Finally, in this regard, when the Legislature provides a specific, future effective date and omits any reference to retroactivity, such reference supports the conclusion that the statute applies prospectively only. ["That the Legislature provided for the law to take immediate effect *upon its filing date*…only confirms its textual prospectivity"]. *LaFontaine*, p. 40. As in *LaFontaine*, Executive Order 225 stated: "The Order shall have immediate effect."

(Defendant's Exhibit 1). As *in LaFontaine*, this statement further upholds prospective application only.

The Court of Appeals analysis is complete, very straight forward and controlling; indeed, the controlling analysis of interpretation compels the denial of any affirmative relief by the Supreme Court.

D. The Law of the Case Doctrine Did Not Preclude the Court of Appeals From Ruling In Favor of Plaintiff On Remand

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Grievance Adm'r v Lopatin*, 462 Mich. 235, 260; 612 N.W.2d 120 (2000), *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

Consistent with this doctrine, "[o]n remand, a [lower]court is required to comply with a directive from an appellate court." *Duncan v State*, 300 Mich App 176, 188; 832 NW2d 761 (2013). "[T]he law of the case doctrine applies only to issues implicitly or explicitly decided in the previous appeal," and a lower tribunal "fails to follow the law of the case when it revisits a matter on which this Court has already ruled." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). See also *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

The law of the case doctrine's rationale is to maintain consistency and avoid reconsideration of matters once decided during the course of a single lawsuit; the doctrine does not limit an appellate court's power but, rather, is a discretionary rule of practice. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007).

Defendant asserts that the law of the case doctrine precluded the Court of Apeals from ruling in Plaintiff's favor on remand because the Supreme Court already applied the LaFontaine standards in the Defendant's favor in its remand order. The Court of Appeals properly rejected this contention and correctly held that the Supreme Court's prior statements in its remand order do not create the law of the case as they addressed a separate and different point.

Indeed, in its October 25, 2016 Opinion on remand, the Court of Appeals addressed this issue fully as follows:

> In its order remanding the case to this Court, our Supreme Court stated that "EO 225 clearly states that, as of August 1, 2012, the defendant no longer has an obligation 'to continue to make contributions' [*13] under Article III of the Trust Agreement." *City of Pontiac II*, 499 Mich at 921. But because EO 225 "does not differentiate between already accrued, but unpaid obligations and future obligations, [it] thus by its terms applies to both." *Id.* Thus, our Supreme Court held that this Court "erred by concluding that the emergency manager did not intend to extinguish the defendant's 2011-2012 fiscal year contribution." *Id.* The law of the case doctrine binds this Court on remand to follow a decision of our Supreme Court regarding a particular issue in the same case. *People v Herrera*, 204 Mich App 333, 340, 514 NW2d 543 (1994). This Court is therefore bound by our Supreme Court's determination that EO 225 by its terms applies to both accrued but unpaid obligations and future obligations and that the EM intended to extinguish defendant's 2011-2012 fiscal year contribution.
>
> But our Supreme Court did not determine whether EO 225 satisfies the first principle set forth in *LaFontaine*, i.e., "whether there is specific language providing for retroactive application." *LaFontaine*, 496 Mich at 38. Indeed, the Supreme Court's decision to remand the case to this Court to conduct an analysis under *LaFontaine* strongly suggests that the Supreme Court did not mean to resolve that issue. **The fact that, as our Supreme Court determined, EO 225 "does not differentiate between already accrued, but unpaid obligations and future obligations, and thus by its terms applies to both[,]" *City of Pontiac II*, 499 Mich at 921, does not answer the question whether EO 225 expresses *with the requisite degree of clarity* the intent that EO 225 would have a retroactive effect**. See *Davis*, 272 Mich App at 155-156 (requiring a clear, direct, and unequivocal expression of intent to have a statute apply retroactively); *id.* at 167 (explaining that the United States Supreme Court has "emphasized that to give legislation retroactive effect, Congress is required to 'so indicate in the language of the statute in a manner that is so clear and positive as to leave no

> room to doubt that such was the intention of the legislature'"), quoting *Landgraf v USI Film Prods.*, 511 U.S. 244, 272; 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). See also *Frank W Lynch & Co*, 463 Mich at 587, (expressing agreement "with the *Landgraf* Court that 'a requirement that [the Legislature] make its intention clear helps ensure that the Legislature itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.'"), quoting *Landgraf*, 511 U.S. at 268.
>
> Defendant's Exhibit 4, pp. 6-7 [footnote omitted]

Defendant's attempted employment of the "law of the case doctrine" also subverts the principle that neither the law nor an appellate-remand order should be applied to require the doing of a useless act. *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 669; 66 NW2d (1954), *Association of Businesses Advocating Tariff Equity v Public Services Comm*, 173 Mich App 647, 673; 434 NW2d 648 (1988). Simply, if the Supreme Court intended to itself hold that the language of EO 225 satisfied the first of the *LaFontaine* standards, it would not have directed the Court of Appeals to analyze that issue and make that very determination.

ARGUMENT II

RETROACTIVE APPLICATION OF EXECUTIVE ORDER 225 WOULD VIOLATE MICHIGAN'S CONSTITUTION.

The Michigan Supreme Court also authorized the Court of Appeals to address the following consideration:

> (3) if *LaFontaine* does not apply, the appropriate method for determining whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution.

Plaintiff asserts that even if *LaFontaine* does not apply the question of whether EO 225 constitutes a permissible retroactive modification of the 2011-2012 fiscal year contribution would require an analysis of compliance with *Const. 1963, Article 9, Section 24* .

Specifically, any accrued financial benefits of a public retirement system pension plan are, by constitutional mandate stated in *Const. 1963, Article 9, Section 24*, a contractual obligation that cannot be diminished or impaired. This section of the Constitution requires that benefits arising out of account of service rendered in each year be funded during that year.

Michigan's Const. Article 9 §24 provides as follows:

> Public Pension Plans and Retirement Systems. Obligation. The accrued financial benefits of each pension plan and retirement system of the State and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits, annual funding. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Also, under the Michigan Constitution, no law "impairing the obligation of contract shall be enacted," Const. 1963, art 1, § 10. Likewise, the federal constitution prohibits any state from passing any "Law impairing the Obligation of Contracts . . . ," US Const, art I, § 10. The

Contract Clause protects "bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements." *Health Care Ass'n Workers Compensation Fund v Dir of the Bureau of Worker's Compensation*, 265 Mich App 236, 240; 694 NW2d 761 (2005). However, the clause is not absolute, but "must be accommodated to the inherent police power of the State to safeguard the vital interests of its people." *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 410; 103 S Ct 697; 74 L Ed 2d 569 (1983). "[S]tate regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." *Id.* at 411.

In analyzing a Contract Clause issue, Michigan courts utilize a three-pronged test. The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable. In other words, if the impairment of a contract is only minimal, there is no unconstitutional impairment of contract. However, if the legislative impairment of a contract is severe, then to be upheld it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means adopted to implement the legislation are reasonably related to the public purpose. *Health Care Ass'n*, 265 Mich App at 241 (citations omitted). For a substantial impairment of a contract to be reasonable and necessary, the state must not impose a dramatic impairment when a more moderate course would serve its purposes equally as well. *City of Pontiac Retired Employees Assoc. v Schimmel,* 751 F 3d 427,431 (6th Cir 2014).

In a similar action filed by the City of Pontiac Retired Employees Association against the City of Pontiac and its Emergency Manager, the Sixth Circuit held that a complete analysis

of the constitutional ramifications arising from a similar Executive Order terminating accrued medical benefits required fact finding from the trial court as to whether, *inter alia*, "the reductions and eliminations of health care benefits were 'necessary and reasonable' under the Contract Clause." 751 F 3d at 433.

Plaintiff reiterates that leave to appeal should be denied for the reasons set forth in Arguments I and II, above. However, in the alternative, should the Supreme Court order a remand, any remanded activities should include a complete constitutional analysis by the trial court. In the instant action, Plaintiff has repeatedly contested the applicability of *Studier v Michigan Public Schools Retirement Board*, 472 Mich 642; 698 NW 2d 350 (2005) because, unlike in *Studier*, this action involved an impairment of contractual rights. Given the applicability of the state and federal constitutional Contractual Clauses, any remand orders should be consistent with the remand order in *City of Pontiac Retired Employees Assoc. v Schimmel*, *supra*.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests that this Honorable Court deny leave to appeal for the reasons stated in Argument I, *supra*.

Respectfully submitted,

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Dated: 12/08/2016

W1909063.DOC